IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, PLAINTIFF IN ERROR,
vs.
CLAY MAY.
No. 185.

In Error to the County Court of Bell County, State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

On April 18, 1901, the legislature of the State of Texas passed the following act: —

"*An act to prohibit railroad and railway companies or corporations in this State from permitting Johnson grass*

or Russian thistles from going to seed upon their right of way, and fixing a penalty.

Section 1. Be it enacted by the legislature of the State of Texas: It shall hereafter be unlawful for any railroad or railway company or corporation doing business in this State to permit any Johnson grass or Russian thistle to mature or go to seed upon any right of way owned, leased or controlled by such railroad or railway company or corporation in this State.

Section 2. If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company, or corporation, that said railroad or railway company, or corporation, has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way, *such person so suing shall recover from such railroad or railway company or corporation, the sum of twenty-five dollars, and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right of way.* Provided, any owner of land, or any person controlling land contiguous to the right of way of any such railroad or railway company, *who permits any Johnson grass or Russian thistle to mature, or go to seed upon said land, shall have no right to recover from such railroad or railway company as provided for in this act.*" (General Laws of Texas, 1901, p. 283.)

Clay May instituted this suit against The Missouri, Kansas & Texas Railway Company of Texas in the Justice Court of Precinct No. 3, Bell County, Texas, on the 16th day of September, 1901, to recover *a debt and damages* in the sum of twenty-five ($25.00) dollars, alleging in his

complaint that he was the owner of a certain tract of land in Bell County, Texas, near the town of Holland, which is contiguous to the right of way of The Missouri, Kansas & Texas Railway Company of Texas, and that the said railway company did, on, to wit, the 7th or 8th day of September, 1901, permit Johnson grass to go to seed upon its right of way (Tr., p. 2).

On October 11, 1901, The Missouri, Kansas & Texas Railway Company of Texas filed its answer, demurring and denying generally, and answered specially that plaintiff had permitted Johnson grass to go to seed on the land owned by him contiguous to its right of way (Tr., p. 3).

On the same day, October 11, 1901, a judgment was rendered by the justice of the peace in favor of Clay May, and against The Missouri, Kansas & Texas Railway Company of Texas for the amount sued for and costs (Tr., p. 4).

From that judgment The Missouri, Kansas & Texas Railway Company of Texas duly prosecuted an appeal to the County Court of Bell County, Texas (Tr., p. 5).

In the County Court, Clay May, with the permission of the court, reduced his complaint to a formal petition, averring in substance that he was at the time of the acts complained of the owner in fee simple of a certain tract of land, describing the same by metes and bounds, in Bell County, Texas, which land was contiguous to the right of way of The Missouri, Kansas & Texas Railway Company of Texas; that said railway company was a private railway corporation, duly incorporated and organized under the laws of the State of Texas, owning, operating, maintaining and controlling the right of way therein referred to as being contiguous to his land in Bell County, Texas, and the railway tracks thereon as a part of its railway system; that on the 7th day of September, 1901, said railway company permitted a large amount of Johnson grass to ma-

ture and go to seed upon its right of way aforesaid; that he, Clay May, had not at any time permitted Johnson grass or Russian thistle to mature or to go to seed upon any land of his which was contiguous to the right of way of The Missouri, Kansas & Texas Railway Company of Texas, and that by reason of the premises and by virtue of the act of the legislature herein above quoted, he sues for the sum of twenty-five ($25.00) dollars, as provided for in said act (Tr., p. 6).

There was no allegation or proof that plaintiff had sustained any damage by reason of the facts alleged in his petition.

On October 16, 1902, said The Missouri, Kansas & Texas Railway Company of Texas, with the leave of the court filed in the County Court its first amended original answer, admitting the allegations of plaintiff's petition, but denied his right of action for the reason that the act in question is the only law in the State of Texas authorizing the bringing or maintaining this suit, and that it is unconstitutional and void in that it is in violation of and repugnant to that portion of the first section of the 14th Amendment to the Constitution of the United States providing that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Tr., p. 8.)

The County Court on Oct. 16, 1902, rendered judgment for plaintiff, Clay May, and against the defendant, The Missouri, Kansas & Texas Railway Company of Texas, for the sum of twenty-five ($25.00) dollars, and costs, with legal interest from said date, to which The Missouri, Kansas & Texas Railway Company of Texas excepted in open court (Tr., p. 13).

The Missouri, Kansas & Texas Railway Company of Texas filed its motion for new trial on October 16, 1902 (Tr., p. 14) and the same was overruled October 17, 1902, to which an exception was taken in open court by The Missouri, Kansas & Texas Railway Company of Texas (Tr., p. 15).

Thereafter the plaintiff in error filed its petition for a writ of error from this court, together with assignments of error and supersedeas bond. The petition was allowed and supersedeas approved by this court, and writ of error duly filed in the court below on the 11th day of December, 1902, and citation duly served upon the defendant in error. (Tr. of Record, pages 19–25.)

SPECIFICATIONS OF ERROR.

I.

The County Court of Bell County, Texas, erred in not holding and adjudging the act of the legislature of the State of Texas, entitled "An act to prohibit railroad and railway companies or corporations in this State from permitting Johnson grass or Russian thistle from going to seed on their right of way, and fixing a penalty," approved April 18, 1901, void and unconstitutional, as repugnant to and in violation of the 14th Amendment to the Constitution of the United States, and in not dismissing plaintiff's action as prayed in defendant's original answer, and in rendering judgment for the plaintiff; because

1. Said act seeks to make it unlawful for a railroad or railway company doing business in the State of Texas to permit Johnson grass or Russian thistle to mature or go to seed upon any right of way owned, leased, or controlled by such railroad or railway company or corporation in said

State; but does not make it unlawful for any other citizen of said State or of the United States owning, leasing or controlling any right of way or other lands or railroad in said State to permit Johnson grass or Russian thistle to mature or go to seed on their said premises.

2. Said act seeks to authorize any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company or corporation which has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way to sue and recover from such railroad or railway company or corporation the sum of twenty-five dollars ($25.00), and any such additional sum as he may have been damaged thereby, but does not authorize such railroad or railway company or corporation to sue and recover from other citizens or from any railroad company any penalty or other sum of money for permitting Johnson grass or Russian thistle to mature or go to seed upon the premises of such other citizen or railroad company contiguous to its right of way.

3. While the railway company is subject to suit, penalty and damages under said act for permitting Johnson grass or Russian thistle to mature or go to seed upon its right of way, no other citizen or class of citizens are subject to a like punishment or damages for permitting Johnson grass or Russian thistle to mature or go to seed upon their premises.

4. Said act authorizes a recovery of the penalty therein prescribed by the persons designated although such persons, and no other persons, in fact, suffer or sustain any damages whatever by reason of the things prohibited.

5. Said act abridges the privileges of this defendant and of all other railway companies to plant, cultivate or mature,

or to permit to grow and mature or go to seed upon any right of way owned, leased or controlled by them in said State any and all crops, grasses and other products of the soil, which privilege all other citizens and classes of citizens enjoy and may enjoy and exercise with perfect immunity under the provisions of said act and general laws of the State of Texas.

6. Said act denounces as unlawful and authorizes the recovery of penalties and damages from railroad companies for the acts mentioned in said statute and leaves all other citizens free to permit or suffer the things prohibited by said act, and thereby makes an unreasonable, unjust, arbitrary and unlawful distinction in classification against railroad and railway companies, including this defendant, and in favor of other citizens, and abridges the privileges and immunities of railway companies, including this defendant, and deprives them and this defendant of their property without due process of law, and denies to them and this defendant, the equal protection of the laws.

II.

The County Court of Bell County erred in not sustaining the special exception of The Missouri, Kansas & Texas Railway Company of Texas to plaintiff's demand and cause of action on the ground that said act of the legislature of the State of Texas of April 18, 1901, was in violation of and repugnant to the Fourteenth Amendment of the Constitution of the United States.

III.

The County Court of Bell County erred in holding and deciding that said act of the legislature of Texas was con-

stitutional and not repugnant to the Fourteenth Amendment to the Constitution of the United States, and that upon the pleadings the plaintiff was entitled to recover of and from the defendant the sum of twenty-five dollars ($25.00) penalty, with interest, as provided in said act.

IV.

The trial court erred in not rendering judgment for The Missouri, Kansas & Texas Railway Company of Texas, defendant and plaintiff in error.

ARGUMENT.

The writ of error to the County Court of Bell County was properly allowed, as that was the highest court in the State of Texas in which a decision in this case could be had. Sections 1, 2, 3, 6, 7, 8, 15 and 16 of the Constitution of Texas; Articles 940, 941 and 996 Revised Statutes of Texas, 1901; Hall *v.* McGill, 28 Southwestern Reporter, 828; G. C. & S. F. Ry. *v.* Hefley, 158 U. S. 98.

The several specifications of error are similar in import. They raise the same question in different forms, and consequently may be treated together.

The only question at issue is whether the act of the legislature of the State of Texas, known as the "*Johnson Grass Statute*" is violative of this portion of Section One of the 14th Amendment to the Constitution of the United States providing that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This act, the constitutionality of which has been assailed from the inception of this litigation, renders it unlawful for railway companies to permit Johnson grass or Russian thistle to mature or go to seed upon their right of way, and on its face purports to have been enacted for the protection of persons owning, leasing or controlling land contiguous to the right of way of railway companies who have not permitted Johnson grass or Russian thistle to mature or go to seed on their land. That this was its mission, is obvious. The act manifestly

was not intended as a police regulation to insure the safety of passengers and employees by requiring railway companies to clear their right of way of matured Johnson grass or Russian thistle in order that the engine crew may have an unobstructed view of the line of travel, for it does not appear that Johnson grass or Russian thistle more than other forms of vegetation prevent this view; nor is it perceived why proprietors of land contiguous to the right of way should have any special interest in the welfare of the traveling public or employees engaged in the operation of railway trains, or why the statute should not apply when Johnson grass or Russian thistle is permitted to mature or go to seed on land contiguous to the right of way. Similar considerations will warrant the claim that the act was not designed for the protection of animals that stray upon the right of way, or with the view of preventing the communication of fire and destruction of property in neighborhoods adjacent to the lines of railroads. It is apparent that the protection accorded by this act is limited in its scope and purpose to persons named in section 2 thereof. Had it been the intention of the legislature in the exercise of its police powers to prescribe a regulation in the interest of the public generally, to insure safe travel, protect stock, prevent conflagrations, or the like, it is not conceivable that the legislature would have made its operation to depend upon the acts of particular third persons which in nowise tend to insure or defeat the accomplishment of those objects.

It is further evident that if Johnson grass or Russian thistle is permitted to mature or go to seed on the right of way, the evil tendencies of the same, sought by this act to be remedied, are not set in motion or augmented by the operation of cars or locomotive engines along the right of way; that is to say, there is no relation between the operation of cars and locomotive engines along the right of way and permitting Johnson grass or Russian thistle to mature or go to

seed thereon in respect to the evils designed to be corrected. To protect the persons designated in section 2 of the act against fire was clearly not the motive which induced this legislation. Had this been in mind, the legislature certainly could not have lost sight of the object in view to the extent of limiting the prohibition to Johnson grass and Russian thistle when other combustible material along the right of way would serve in an equal degree as a medium of communication of fire to abutting property. It is not shown, and it probably will not be claimed that Johnson grass or Russian thistle is more readily ignited by sparks and coals of fire set out by engines than prairie hay and other grasses and weeds. Nor for obvious reasons could it have been the intention to protect the cattle of these persons which may stray upon the right of way, for it is not perceived in what manner the growing of Johnson grass or Russian thistle on their property would prevent the engine crew from discovering such cattle in time to avert striking them. The fact that the Johnson grass or Russian thistle was permitted or prevented from maturing on the right of way would neither in a greater or less degree endanger the cattle while on the right of way. The evil then desired to be reached must be found in the nature of this plant.

It will not be denied that Johnson grass is a menace to crops, and on account of its rapid growth and the difficulty of controlling or eradicating it, is a grave menace to particular farmers. It should be admitted in return, and it is a matter of common knowledge, that Johnson grass is highly prized for hay and pasturage, and that a large number of bales are marketed annually. It will be admitted further that practically the only means by which it is propagated is by the seed, — hence the provisions against permitting Johnson grass to go to seed. Russian thistle to have become an object of special legislation must likewise be a public menace. It is known, that if this plant like many others,

is permitted to mature its seed would be scattered by the winds. If a public menace why should only those mentioned in this act be protected and why should railway companies alone stand the burden of such protection?

The foregoing observations are deductions made from the face of the act with a view of endeavoring to ascertain its scope and purpose. The act on its face seeks to protect persons owning, leasing, or controlling land contiguous to the right of way, as a class, from Johnson grass or Russian thistle, and to that end imposes a penalty, and an absolute liability irrespective of negligence or actual damages on railroad or railway companies or corporations, as a class, for permitting Johnson grass or Russian thistle to mature or go to seed upon the right of way.

We are not concerned as to whether it would be wise or expedient to enact laws looking to the eradication of Johnson grass or Russian thistle. Nor do we contend that it would not be within the confines of legitimate legislation to prescribe general regulations for the protection of products of the soil. In Barbier *v.* Connolly, 113 United States, 27, 31, it was said that "The amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the powers of the State, sometimes termed its police powers, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." This is not the grievance. Our contention is that the classifications attempted by this legislation for the purpose of affording protection and for distributing burdens to that end are violative of fundamental conceptions of due process of law and its equal protection. A consideration of this involves two inquiries: in endeavoring to protect persons owning,

leasing, or controlling land contiguous to a railroad right of way has there been a constitutional distribution of burdens? Is there such an imperative necessity to protect these designated persons and distinguish them as a class from the general public as would warrant the imposition of these burdens?

It will not be contended that in imposing penalties and liabilities for a public end, the right to make classifications is not in the scope of legislative authority, but it is denied that such classifications may be arbitrary and that particular persons may be made to bear burdens when other persons similarly situated with respect to the purpose for which such burdens were imposed, are exempted.

In Barbier *v.* Connolly, 113 U. S. 27, 30, in which the constitutionality of an ordinance prohibiting the washing and ironing of clothes in public laundries and wash houses within certain designated limits of the city and county of San Francisco between the hours of 10 p. m. and 6 a. m. was considered, this court said: —

> "The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation

of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and Board of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be

laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions, class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In declaring void as being repugnant to the 14th Amendment the ordinance making it unlawful to carry on a laundry within the corporate limits of the city and county of San Francisco, when the same was located in a brick or stone building, or to erect or maintain any scaffolding upon the roof of any building without first obtaining the consent of a Board of Supervisors, this court in Yick Wo *v.* Hopkins, 118 U. S. 356, 368, referring to this ordinance, observed that: —

> "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all of those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living."

Considering this case further, the court, on page 373, said: —

> "The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion,

that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

In Dent *v.* West Virginia, 129 U. S., pp. 114, 124, while the statute of West Virginia was upheld which provided that every practitioner of medicine unless he had been practicing ten years prior to March 8, 1881, would be required to obtain a certificate from the State Board of Health that he was a graduate in a reputable medical college in the school of medicine to which he belonged, or to stand an examination in order to demonstrate his qualifications, this court recognized the principle that as due process of law was designed in England to insure the subject against arbitrary action of the Crown, so: —

"In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to oper-

ate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

In considering the constitutionality of an act of the legislature of the State of Texas, approved . pril 5, 1889, providing that attorney's fees may be recovered by plaintiffs in actions against railway companies on claims not exceeding $50.00 in amount for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by trains, when such claims have been presented to the railway company and such railway company fails within thirty days to pay and satisfy the same, this court, in Gulf Colorado & Santa Fe Railway *v.* Ellis, 165 U. S., pp. 150, 153, said: —

"The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered, as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like condi-

tions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In conclusion in the same case, on page 165, the court remarked that:—

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection."

In Atchison, Topeka & Santa Fe Railroad Company *v.* Matthews, 174 U. S. 96, 104, this court upheld a statute of Kansas allowing attorney's fees for the plaintiff in an action against the railroad company for damage by fire, but did not announce a doctrine with reference to classification at variance with that stated in the cases considered, *supra*. The court said: —

"On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. Yick Wo *v.* Hopkins, *supra*, forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished."

An act of the State of Kansas providing that all stock yards which had an average daily receipt of a prescribed number of cattle, hogs, and sheep, should constitute public stock yards, and placing certain restrictions upon persons operating same, was, in Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 111, adjudged unconstitutional. The court said: —

" So again exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another — certain burdens imposed on one which do not rest upon another.

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a State m

regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

This court had occasion recently to review this whole subject in the case of Connolly *v.* Union Sewer Pipe Company, 184 U. S. 540, where the anti-trust statute of Illinois, which exempted "agricultural products or live stock while in the hands of the producer or raiser" from its provisions, was held unconstitutional and void, on the ground that the attempted classifications were arbitrary and unreasonable, and that under the act agriculturists might do the very things which other persons and corporations were prohibited from doing. The court said that the guarantee of equal protection means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances," and that all persons "shall be treated alike under like circumstances both in the privileges conferred and in the limitations imposed." The court further said: "Due process of law and equal protection of the laws are secured if the laws operate on

all alike and do not subject the individual to an arbitrary exercise of the powers of government."

An act of the Assembly of the State of Pennsylvania levied a tax on all persons, firms and corporations employing foreign born unnaturalized male persons over twenty-one years of age at the rate of three cents per day for each day such person was employed, and providing that the amount of such tax could be deducted from the wages of the employee, thereby in effect imposing the tax on the employee and not the employer. In Fraser *v.* McConway & Torley Co., 82 Fed. 257, 259, the court held that: —

> "This tax, as we have seen, is imposed 'at the rate of three cents per day for each day each of such foreign-born unnaturalized male persons may be employed.' The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign born unnaturalized male persons over 21 years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others, under like circumstances, are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a State exemptions from any burdens or charges other than such as are equally laid upon all others under like circumstances."

The court on page 260 remarked: —

> "It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here."

State decisions are to the same effect: —

Following the decision of this court in the case of Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, *supra*, the Court of Civil Appeals of Texas, in the case of State ex rel. *v.* Waters-Pierce Oil Co., 67 S. W. Rep. 1057, held an anti-trust act of the State of Texas, which exempted from its provisions "agricultural products or live stock in the hands of the producer, and the organizations of labor," unconstitutional and void, and repugnant to the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of North Carolina in declaring an ordinance which prohibited the construction of any building or addition thereto without the permission of the aldermen void, said, in North Carolina *v.* Tenant, 15 L. R. A. 423, 424, that: —

> "The legislature is empowered under organic law, to restrict an individual, by direct enactment, in the exercise of such dominion and control over his own house or premises as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over others; and, though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing."

In Luman *v.* Hitchins Bros. Co., 46 L. R. A. 393, 395, the Supreme Court of Maryland said that: —

"A statute which denies to one person the protection that is accorded to others under the same conditions and in the like situation, or which imposes on one a burden not similarly borne by others, is, because it discriminates, in both instances, invalid under the paramount organic law. Though it was perfectly competent to the legislature to prevent railroad and mining corporations from engaging in the business of bartering or selling goods, wares, and merchandise, either by not conferring such a power upon them in their charters, or, if it had been conferred, then, by subsequently amending the charters and imposing the restriction by such an amendment, yet it was obviously not within the power of the general assembly to deny to particular individuals who happened to be officers of those corporations, and merely because they were such officers, the right which every other citizen of the county, whether an officer of other corporations or not, possessed to sell goods, wares, and merchandise within the county. Whilst the legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes, these classifications must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

The Supreme Court of California in Ex parte Leo Jentzsch, 32 L. R. A. 664, 666, in adjudging a law unconstitutional which prohibited barbers from carrying on business after 12 o'clock on Sundays and legal holidays, uses this language: —

"A law is not always general because it operates

upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all. As was said in Pasadena *v.* Stimson, 91 Cal. 238: 'The conclusion is that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' And in Darcy *v.* San Jose, 104 Cal. 642: 'This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation.' "

In Wally's Heirs *v.* Kennedy, 2 Yerg. 554, 24 Am. Dec. 511, it is said —

"The right of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land, under similar circumstances. Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, and the mass of the community and those who made the law by another; whereas the like general law, affecting the whole community equally, could not have been passed."

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In Holden *v.* James, 11 Mass. 396, 6 Am. Dec. 174, it is said: —

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our institutions and laws, that one citizen shall enjoy privileges and advantages which are denied to all others under like circumstances; or that one shall be subject to losses, damages, suits, or actions from which others under like circumstances are exempted."

In Cooley on Constitutional Law, 7th Ed., p. 559, it is said: —

> "Every one has the right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and countryman at plow. This is a maxim of constitutional law, and by it we may test the authority and binding force of legislative enactments."

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> "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some

reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.

"Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government."

Many other authorities might be quoted, but it is not deemed necessary, as the principle seems settled, and argument in its support is needless. While the principle is clear, its application sometimes affords a ground of contention, and the inquiry in each case is whether the particular classification is based upon some natural or reasonable basis which distinguishes the persons included.

Do any reasons exist which justify the classification of the persons designated in section 2 of the act in question, as specially requiring protection from Johnson grass and Russian thistle, or justify the imposition of burdens and penalties upon railways alone in affording that protection? At the outset we have this anomalous condition: It is unlawful for railway companies to permit these plants to mature on their right of way, while parties owning land contiguous to the other three sides of the property designed to be protected, are absolutely unrestrained, so far as this act is concerned, from growing them, and permitting them to go to seed. What reasons the legislative mind perceived for drawing a distinction between railway companies and other owners of land adjoining the property of these persons we are unable to suggest. Is there any reason except one is a railway corporation and the other an individual? The distinction cannot be predicated upon the fact that cars and locomotives are operated along the right of way. We have endeavored to show that there is no connection between permitting Johnson grass or Russian thistle to mature on the right of way, and operating cars and locomotives along the same, in respect to the object sought to be accomplished. Nor do we think the distinction can be sustained upon any theory that incentives exist in the one case to prevent Johnson grass and Russian thistle from maturing while none exist in the other. If it is claimed that there are no inducements for railway companies to prevent Johnson grass and Russian thistle from maturing on their right of way, it may be answered that this consideration is of a negative character, while the high qualities of Johnson grass as a forage affords an inducement for the other property owners to grow it if they are engaged in farming or stock raising. If a desire to protect their own crops is assigned as a reason for supposing that the other property owners will endeavor to eradicate or prevent the spread

of Johnson grass and Russian thistle, the reason fails if the property owner is not directly interested in the growing of crops. Moreover, it is denied that there are no inducements for railway companies to prevent these plants from maturing on their right of way: A duty is imposed by law upon railway companies to use due care to clear their right of way of inflammable matter, which usually finds sufficient promptings in the fear of destruction of property by fire and damage claims therefor to induce its performance.

In Ft. W. & D. C. Ry. Co. *v.* Hogsett, 67 Tex. 685, 688, the Supreme Court held that: "The fourteenth assignment of error complains of the charge because it instructs the jury, in effect, that if the company left any grass, or weeds, or other combustibles on its track, that of itself was negligence. This is precisely the rule as laid down by the most eminent text-writers, and gathered from the great weight of authority (1 Thompson on Negligence, 162; Cooley on Torts, 592; Troxler *v.* Railway Company, 74 North Carolina, 377; Railroad Company *v.* Chase, 11 Kansas, 47; Flynn *v.* Railroad Company, 40 California, 14)."

So in T. & P. Ry. Co. *v.* Ross, 7 Tex. Civ. App. 653, in commenting upon the charge of the trial court to the effect that "they (railways) are required * * * to prevent the accumulation of combustible material on their right of way, or the right of way used by them in the operation of their trains * * * ", the court said that "whether appellant is charged with keeping the track in repair or not, we are of the opinion that there was a lack of proper care and caution in running over track covered as this was with combustible matter, and by reason of this want of due care and caution appellant's liability would attach."

In St. L. S.-W. Ry. Co. of Texas *v.* Knight, 41 S. W. Rep. 416, 417, the Court of Appeals used this language:

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"The accumulation of combustible material on the right of way, if such fact existed, might or might not have been to such an extent as to have amounted to negligence on the part of the company, and this issue should have been submitted to the jury. Our courts have, in some instances, when the existence of a given state of facts clearly showed negligence, approved a charge to the effect that, if conditions existed, the jury should find a certain way. But as a general rule the question should be left to the jury to determine the existence or non-existence of negligence.

Supposing that the statute operated equally upon all owners of property contiguous to the property of the persons designated in section 2 of the act, unless there is some reason why, they as a class distinguished from the public generally, are in special need of protection from Johnson grass and Russian thistle, the statute would still be open to the charge of being partial and discriminating.

In Lawton *v.* Steele, 152 U. S. Rep. 133, 135, the court said: —

> "Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S. 27; *Kidd* v. *Pearson*, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, *that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.*"

In Pasadena *v.* Simpson, 91 Cal., p. 238; 27 Pac., p. 604, the court said: —

> "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional *if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.*"

Statutes imposing burdens for the protection of a particular class have been upheld, but in such case it seems there was some special reason which distinguished that class from the general public as in need of protection. A statute of Massachusetts making the liability of a railroad company for the destruction of property by fire communicated from its locomotive engines absolute, was upheld,* in Hart *v.* Railroad, 13 Metc. 99. The court said: —

> "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of

* In Atchison, Topeka & Santa Fe Railway Company *v.* Clark, 58 Pacific Rep. 477, a statute of the State of Kansas providing for the levy of a fire tax, but which excluded the property of railroad companies, upon which the tax was levied, from the benefit and protection of the law and tax, was held unconstitutional and void.

So in the case at bar, while railroad companies are taxed and mulcted in damages for the benefit of the contiguous landowner, the railroad companies are not reciprocally protected against the same act by the contiguous landowner. He may grow and permit "Johnson grass" and "Russian thistle" to go to seed upon his land, without giving to the contiguous railroad company, or the contiguous landowners on the other three sides, any right of action against him.

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such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it."

So, if employees in the discharge of their duty are subjected to special perils and hardships, special legislation for their protection would not seem objectionable. In upholding a statute of Kansas making railway companies responsible in damages to employees for injuries sustained by reason of the negligence of a co-employee, in Missouri Pacific Railway Company *v.* Mackey, 127 U. S., pp. 205, 210, this court said: —

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to

carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

On page 209 of the same case, the court said: "A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

There are no apparent reasons for supposing that persons owning land contiguous to the right of way of a railway company are in any greater need for protection from Johnson grass and Russian thistle than persons off the line of a railroad. If it is said that seed of Johnson grass is scattered along the right of way in districts which are not infected with Johnson grass while the same is being transported by railway companies, it would be sufficient answer to state that the prohibition in the act is not confined to such districts but applied to all districts, whether infected with Johnson grass or not. Moreover, the act cannot be sustained on this ground as it does not appear, and it is denied that railway companies transport Russian thistle. Again, if this theory is offered to sustain the act there would be a discrimination in the fact that farmers and teamsters are not prohibited from hauling Johnson grass unbailed and exposed to the winds along public highways.

While it may be true that a presumption is indulged in to the effect that the legislature having knowledge of the

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existing conditions, acted upon lawful motives, yet as said by this court in the *Ellis* case cited *supra*: —

> "To carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action."

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